STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED September 11, 2003
v	No. 243035 Wayne Circuit Court
THOMAS R. BRUNAS, Defendant-Appellant.	LC No. 01-007841-01

Before: Donofrio, P.J., and Bandstra and O'Connell, JJ.

PER CURIAM.

Defendant appeals as of right from his conviction for manslaughter, MCL 750.321 for which he was sentenced to 10 to 15 years' incarceration. We affirm the conviction but remand for resentencing.

Defendant was charged with first-degree premeditated murder. The jury was instructed on this charge, as well as on the lesser included offenses of second-degree murder, voluntary manslaughter, involuntary manslaughter, and negligent homicide. The jury deliberated, and indicated that it had reached a verdict. The clerk inquired of the foreperson how the jurors found as to the first count, first-degree murder. The foreperson responded "Not guilty." The prosecutor asked for the jurors to be individually polled, and the jurors indicated that their verdict was, in fact, "not guilty." The following colloquy then occurred:

> THE COURT: All right. Anything further?
>
> [THE PROSECUTOR]: No, your Honor.
>
> THE COURT: Okay, Ladies and gentle, [sic] once again I'd like to thank you for your participation and sacrifice in this matter. I'm going to release you from the jury room, and you may go back into the jury room at this moment.
>
> THE DEPUTY: All rise.

The lower court file reflects that the jurors were excused to the jury room at 3:30 p.m. As the trial court began to take up the issue of canceling defendant's bond, it was presented with the jury's verdict form, which showed that the jury had convicted defendant of the lesser included

offense of voluntary manslaughter. At 3:31 p.m., the jury was brought back from the jury room and the following exchange occurred:

> THE COURT: Ladies and gentlemen of the jury, I apologize. There has been some mis-communication [sic]. The jury form does not reflect the verdict that you read. Would you please read the verdict from the verdict form.
>
> [JURY FOREPERSON]: No, your Honor, we're sorry about the misunderstanding. We, the jury, find the defendant guilty of the lesser offense of Voluntary Manslaughter as a lesser offense of murder.
>
> THE COURT: Thank you. You may go back into the jury room.

After thus being convicted and ultimately sentenced on the voluntary manslaughter charge, defendant moved for a directed verdict of acquittal pursuant to MCR 6.419(B), or alternatively, for resentencing. Defendant's motion for a directed verdict was premised on his contention that by discharging the jurors, only to recall them to render the verdict with which he was ultimately convicted, the trial court violated defendant's state and federal protection against double jeopardy. US Const, Am V, and Const 1963, art 1, sec 15. The issue during the hearing on this motion focused on whether the trial court had actually discharged the jury. The Court responded:

> I would say no. I would say no because I'm sure that this case was probably not different from most. I don't discharge the jury from the jury box. I don't release the jury until after I open that jury room door and I tell them that they are released. And I always say to that that "I will release you momentarily," and that's generally after the verdict has been given. If they've been asked to be polled then they're polled. And if the person is convicted I'll give them a sentence date. If the person is not convicted I'll discharge the defendant and dismiss the case and cancel the bond. So, I would say in my opinion, the jury was not discharged until I released them, and I had not released them at the time that they gave the verdict form to the clerk.

Because the trial court concluded that it had not yet discharged the jury, the trial court disagreed with defendant's assertion that the conviction violated his rights against double jeopardy. We find no error in the trial court's decision.

The prosecutor contends, and we agree, that this case is similar to *People v Gabor*, 237 Mich App 501; 603 NW2d 840 (1999). In *Gabor*, the jury foreperson orally stated the jury's verdict as guilty of offenses other than those which were charged. *Id*. at 502-503. Defense counsel moved to set aside the verdict on that ground after the jury was excused to the jury room. *Id*. at 503. The jury was immediately called back, at which time the jury foreperson read the verdict form a second time and correctly stated the jury's true finding that defendant was guilty of the charged offenses. *Id*. As in *Gabor*, the orally stated verdict here was obviously incorrect when compared with the clear, written verdict form. That discrepancy was quickly noted and the jury was immediately recalled to clear up the confusion. Further, as in *Gabor*, the jurors here

were available to be polled by defense counsel to assure that the corrected verdict was unanimous. *Id*.

We do not find this case to be controlled by *People v Henry*, 248 Mich App 313; 639 NW2d 285 (2001), as defendant argues. *Henry* is distinguishable in at least two important ways. First, *Henry* recognized that, until its discharge, a jury is "free to change the form and substance of a verdict to coincide with its intentions." *Id*. at 319-320. In *Henry*, there had clearly been a discharge of the jury before the prosecutor sought to reconvene it some days later. *Id.* at 316-317. In contrast, it is questionable whether the jury was "discharged" here, where the jurors returned to the jury room only momentarily before being called back to the courtroom. Certainly, none of the concerns regarding a discharged jury returning to render a verdict, i.e., that the jurors might have become subject to outside influence or outright tampering, was a problem here. See *People v Rushin*, 37 Mich App 391, 398-399; 194 NW2d 718 (1971). Further, in contrast to *Henry*, *supra*, where at least one juror died before the attempted reconvening, see *id*. at 322 n 27, the complete jury here was available to announce the verdict that had already been clearly written on the form, and to be subject to polling had defendant demanded it. Accordingly, we do not conclude that defendant's state and federal rights against double jeopardy were violated when the trial court accepted the corrected verdict.

Defendant also argues that he was denied his right to a fair trial by the prosecutor's repeated acts of misconduct during her examination of various defense witnesses, as well as during her closing arguments. To preserve an issue of alleged prosecutorial misconduct for appellate review a party must make "a timely, contemporaneous objection and request for a curative instruction." *People v Callon*, 256 Mich App 312, 329; 662 NW2d 501 (2003). Here, defense counsel objected to some of the alleged instances, but neglected to object to others. Accordingly, some of these instances are preserved, while others are not. To the extent objections were not raised, defendant argues he was denied the effective assistance of counsel. Because defendant did not move for a hearing, this Court's review of his alleged denial of effective assistance of counsel is limited to errors apparent on the record. *People v Knapp*, 244 Mich App 361, 385; 624 NW2d 227 (2001).

Generally, this Court reviews allegations of prosecutorial misconduct on a case-by-case basis, examining the pertinent portion of the record and evaluating a prosecutor's remarks in context. *People v Noble*, 238 Mich App 647, 660; 608 NW2d 123 (1999). The test of prosecutorial misconduct is whether the defendant was denied a fair and impartial trial. *People v Watson*, 245 Mich App 572, 586; 629 NW2d 411 (2001).

Defendant contends that the prosecutor improperly engaged in "character assassination" of him during trial. However, defendant placed his character in issue when he offered character witnesses to attest to his moral fiber. As a result, the prosecutor was permitted to inquire into, and comment upon, reports of relevant specific instances of conduct. MRE 405(a); see also *People v Lukity*, 460 Mich 484, 498; 596 NW2d 607 (1999) ("Where, as here, evidence of a pertinent character trait is admitted, MRE 405(a) allows cross-examination into relevant specific conduct"). Therefore, the prosecutor's inquiry into such matters as defendant's arrest history, failure to pay child support, breeding of animals known to be dangerous, and providing his minor child with alcohol was appropriate. Although there may have been some relevancy issues

regarding some of the prosecutor's inquiries,[1] the touchstone of an allegation of prosecutorial misconduct is whether defendant was denied a fair trial. Defendant has not established how any of the challenged comments, individually or collectively, accomplished that, especially considering the length of this trial. Accordingly, defendant's assertion that he was denied a fair trial as a result of the prosecutor's examination or argument is without merit.

Defendant's allegations that he was denied his right to effective assistance of counsel is based on his belief that his prosecutorial misconduct argument would have been meritorious had his counsel objected. However, as set out above, these questions were either proper under the rules of evidence or otherwise insufficiently prejudicial to have deprived defendant of a fair trial. Accordingly, defendant has failed to meet his burden of establishing that his trial counsel was ineffective. See *People v Pickens*, 446 Mich 298, 302-303; 521 NW2d 797 (1994); see also, *People v Snider*, 239 Mich App 393, 425; 608 NW2d 502 (2000).

Finally, defendant argues that we should remand for resentencing. Because the trial court did not have benefit of the recent Supreme Court decision in *People v Babcock*, ___ Mich ___; 666 NW2d 231 (Docket No. 121310, issued July 13, 2003), and thus did not comply with the procedures it requires, we agree.

A trial court must articulate on the record a substantial and compelling reason that is objective and verifiable in support of its particular departure from the applicable guidelines range. *Id*., slip op at 27. Although the trial court completed a sentencing guidelines departure evaluation form and made comments regarding the departure on the record, there was no analysis, under *Babcock*, of whether the factors considered were "objective and verifiable" or "substantial and compelling," or whether those factors justified the particularly significant departure that was imposed against defendant here. For example, the departure evaluation form states that "defendant exhibited no remorse," apparently meaning that the trial court considered the fact that defendant had no remorse in imposing the sentence. We question whether this is an "objective and verifiable" factor that may properly be considered. Further, for example, the trial court relied on defendant's prior traffic violations as evidence of his careless and insensitive pattern of driving but the record is unclear as to how the trial court determined that prior violations had occurred.

We may not affirm a sentence where a trial court does not properly articulate a substantial and compelling reason for a departure, but must remand for resentencing. *Id*., slip op at 27-28. We do so, directing the trial court to consider *Babcock*, *supra*, in determining whether and how far to depart from the guidelines range applicable here.

[1] Arguably, for example, defendant's alleged comment that Santa Claus was "a fat bastard" probably has very little to do with defendant's moral character or the likelihood that he would intentionally drive his car into a crowd of people.

We affirm defendant's conviction but remand for resentencing. We do not retain jurisdiction.

/s/ Pat M. Donofrio
/s/ Richard A. Bandstra
/s/ Peter D. O'Connell